It appears to me that Barrett-Lennard, J. decided that there was no effective hearing of the application until 10th May when the tenant's counsel appeared but found himself unable to argue; that that was a hearing, and that in deciding by the Order of 10th May to abide by its order of 3rd May, the Board had made an order after hearing the parties; and that on 24th May the Board was perfectly right in deciding that it had no power to re-hear.

In my opinion Barrett-Lennard, J's decision amounts to this—once there has been an effective hearing and adjudication on an application for leave to take proceedings to eject, the Board is *functus officio* and cannot re-hear that application.

It is true that section 9 (5) of the Ordinance of 1921 is not mentioned in Barrett-Lennard, J's judgment but I have no doubt that a counsel with the very high reputation of the late Mr. Koek, who appeared for the tenant in Melanie Lee's case, did not fail to bring its provisions to the notice of the Judge if indeed the latter could have overlooked it in this comparatively short ordinance. Indeed, the subsection was probably Mr. Koek's main ground of argument.

In my opinion, therefore, the headnote in Melanie Lee's case correctly represents what was decided; and, as I have said, the Legislature having re-enacted section 9 as section 7 of the Ordinance of 1939 after Barrett-Lennard, J's interpretation of subsection (5) has placed the stamp of its approval of Melanie Lee's case, and I must follow it whether or not I would have arrived at the same conclusion if that case had never been decided.

I would, however, add a word on Melanie Lee's case. As I read that judgment there was no actual decision that the Board was right in granting the hearing of 10th May. What the learned Judge said was that they were "probably" quite right. In the result it probably was, but I should have thought the correct procedure was certiorari to quash the order of 3rd May as having been made without jurisdiction, the tenant not having been served with the notice of hearing, and mandamus to hear the application. No doubt what the Board did would ultimately have been done had the more roundabout procedure been adopted.

I desire also to reserve the right, should the occasion arise, to consider whether a "hearing" such as took place on 10th May, when neither the landlord nor his counsel was present, when no evidence on behalf of the landlord was given and when counsel for the tenant, whether fully instructed or not, had no opportunity of cross-examining on evidence given on 3rd May, was in fact a hearing at all.

No such question arises in the case before me. It is not suggested that there was not a full and proper hearing and adjudication.

But Melanie Lee's case is binding upon me and I must decide that once the Board had jurisdiction to hear an application for leave to eject and has properly heard and adjudicated upon that application it cannot tack subsection (5) of section 7 on to section 8 and re-hear, reconsider or revise a case under the latter section.

The application for mandamus is dismissed with costs.

Application dismissed.

Solicitors for applicant—*Braddell Bros.*
Solicitors for respondent—*Chan and Eber.*

Note:—This decision was shortly after its promulgation reversed by Statute namely, the Increase of Rent (Restriction) Amendment Ordinance 1941—Editor M.L.J.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

May 8, 1941.

REX vs. L. W. BURGESS.

[SINGAPORE MAGISTRATE'S APPEAL No. 8 of 1941]

Traction Engines and Motor Cars Ordinance (Cap. 214) s. 10 sub-s. 1—Driving a motor car negligently on public thoroughfare—Meaning of public thoroughfare.

The respondent was charged with driving a motor car on a public thoroughfare negligently, an offence under s. 10 sub-s. 1 of the Traction Engines and Motor Cars Ordinance (Cap. 214).

The road in question was the property of the Air Ministry. There were native shops on the road open to the public. The road itself was open to the public except that for twenty-four hours every year it was closed to the public at the Seletar Road entrance for preserving its private nature. On all other days of the year the public had access to the road. It was not however a public road.

Held, that on those days it was a public thoroughfare within the meaning of the section.

MAGISTRATE'S APPEAL.

The Magistrate on the facts set out in the headnote had held that the road was not a public thoroughfare and had acquitted the respondent. From this decision the Crown appealed.

Case referred to:—

(1) *Harrison v. Hill* 1932 S.C. (J.) 13.

C. H. Butterfield (Crown Counsel) for the Crown.

G. M. Coltart for respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

McElwaine, C. J.—The respondent was charged with driving a motor car on a public thoroughfare, to wit, Jalan Kayu, negligently, an offence under section 10 (1) of the Traction Engines and Motor Cars Ordinance (Chapter 214).

At the trial a preliminary objection was raised that Jalan Kayu is not a public thoroughfare. No evidence on this was given but the police appear to have agreed to certain allegations of fact. The Magistrate ruled that Jalan Kayu was not a public thoroughfare and dismissed the charge on the preliminary objection without going into the merits of the case.

The Crown now appeals.

The appeal was argued on the assumption that Jalan Kayu is a road which is the property of the Air Ministry, that at the entrance to the road where it branches off from the Seletar Road is a sign "Jalan Kayu, leading to R.A.F. Station only. Admission by permit". It was admitted that "admission by permit" probably referred to admission to the Station and not to the road. It was also assumed that for twenty-four hours every year this road is closed at the Seletar Road entrance for the express purpose of preserving its private nature. There are native shops on Jalan Kayu between Seletar Road and the Air Station. These shops are open to the public.

"Public thoroughfare" is defined in the Ordinance as including "all public streets, roads, highways, bridges and thoroughfares, and all places over which the public have a right of way for wheeled vehicles, and all roadways to which the public are granted access". The case turns on the meaning of these last ten words.

In the course of his considered judgment the learned Magistrate said:—

> "The definition is a wide one and, as apparently in practice any member of the public may drive his car along Jalan Kayu to the gate of the Air Base itself without let or hindrance, might be taken as covering the present case. I doubt, however, if "**de facto**" use of a road by the public is sufficient to make it a public road. Use of Jalan Kayu by the public appears to me "**ejusdem generis**" as use of any drive leading to a private house by the public. In both cases the owners legally could restrict or prohibit such use. Yet I do not think it would be suggested that because a private individual does not place any restrictions on members of the public driving up to his house his avenue thereby becomes a public thoroughfare. If this view is accepted it would seem there must be a "**de jure**" right over the road on the part of the public before it can be a public thoroughfare.
>
> In my opinion, therefore, Jalan Kayu is not a public road and accordingly, I acquit the accused under section 182 (g) Criminal Procedure Code".

I have no doubt that the words "the public" mean the public at large. What is the meaning of "granted access"? I do not for a moment think, nor did I understand Mr. Coltart to suggest, that 'granted' means 'dedicated', or anything else that would have the effect of turning the road into a highway. "Granted access" means nothing more or less than permitted or suffered to have access. Mr. Butterfield referred me to a short passage in the 1931 Supplement to Stroud at p.9: "Public access to a place, means 'open to all the public in fact, whether by right or permission'; and does not necessarily connote that this must be as of right". This is based on a Scottish decision to which I have not access, but it entirely accords with my own view.

Another Scottish case, *Harrison v. Hill*[1] based on the definition of "Road" in the Road Traffic Act, 1930, "Road" means any highway and any other road to which the public has access", is noted at p.53 of the English and Empire Digest Supplement Vol. 42, as 188 b.i.:—

> "The driver of a motor vehicle was convicted of an offence under section 7 (4) of the Road Traffic Act, 1930, on the ground that, while disqualified for holding a driving licence, he had driven a vehicle on a road forming the access from a public highway to a farm. The road in question was part of the farm and led only to the farmhouse, where it terminated. It had no other houses on it, and it was not maintained by any public authority but by the farm tenant in terms of his lease.
>
> There was no gate at the entrance to it, and no intimation that it was not open to the public; and except at times in summer, when the farmer placed a pole across it to prevent the straying of cattle, there was no obstable to prevent the public having access to it. The road was used by the public as an access to the farm, and members of the public not having business there also frequently walked on it. They had, on several occasions, been turned off by the farmer when there were growing crops in the adjoining fields:
>
> **Held**, the road was a road to which the public had access within Road Traffic Act, 1930, s. 121 (1)".

The present case is a much stronger case. Jalan Kayu leads to shops as well as to the Air Station, only once a year it is closed.

The fact that it is closed on one day in each year to prevent a prescriptive right being acquired indicates that leave or licence to use it on the remaining 364 days of the year is granted to the public.

The words in the concluding part of the definition of "public thoroughfare" are intended to extend the meaning given earlier in the definition, and to construe the words "granted access" as meaning a *de jure* right over the road seems little more than treating the words as surplusage. The words mean that something which is not a public road is to be regarded as a public thoroughfare.

A good deal was said in argument about the many private roads in Singapore, and drives leading to private houses. A distinction may well be drawn between such a drive and the private road off which several drives to individual houses branch.

The drive on an individual dwelling house is not a place to which the public is granted access. A person who, without satisfactory excuse, wilfully trespasses in such drive may be convicted under section 24 of the Minor Offences Ordinance. It may be that trespass is possible on a private road leading to many private dwellings and it will entirely depend on the fact whether a person has a satisfactory excuse.

But so far as Jalan Kayu is concerned, the agreed facts strongly suggest that on all except one day in the year it is indicated to the public that they may use the road, and that on those 364 days the public is granted access to the road and it is, on those days, a public thoroughfare.

I therefore allow the appeal. The Crown does not ask for a new trial. So I do not direct that there should be one.

Appeal allowed.

Solicitors for respondent—*Rodyk & Davidson.*

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.